

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JAMES DAVID McCLAIN,
Petitioner-Appellant,
vs.
LAWRENCE E. WILSON,
Respondent-Appellee.

NO. 20831
44690 ✓

APPELLEE'S BRIEF

Appeal from the United States
District Court for the Northern
District of California
Southern Division

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)	
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APPELLEE'S BRIEF

JURISDICTION

The jurisdiction of the United States District Court to entertain appellant's petition for a writ of habeas corpus was conferred by Title 28, United States Code section 2248. The jurisdiction of this Court is conferred by Title 28, United States Code section 2253, which makes a final order in a habeas corpus proceeding reviewable in the Court of Appeals when, as in this case, a certificate of probable cause has been issued.

STATEMENT OF THE CASE

Appellant, petitioner below, has appealed from an order of the United States District Court for the Northern District of California, Southern Division, denying his application for a writ of habeas corpus.

A. Proceedings in the State Courts

On November 28, 1960, appellant James David McClain was convicted in the Superior Court of San Joaquin County upon his plea of not guilty, while represented by counsel, of the two felony counts of robbery in violation of California Penal Code section 211, and of assault with a deadly weapon in violation of California Penal Code section 245. He was sentenced to imprisonment in the State prison for the term prescribed by law, the robbery sentences to be served consecutively with one another and concurrently with the sentence for the assault.^{1/}

Appellant did not appeal the above conviction. Rather, five years later, he filed a petition for writ of habeas corpus in the Superior Court of Marin County. (TR 6)^{2/} That petition was denied on January 18, 1965. Thereafter, appellant filed a similar habeas corpus petition in the California Supreme Court which was denied without opinion on July 7, 1965 (TR 6). Substantially, the same factual and legal issues now presented to this Court were raised in those petitions.

^{1/} Photocopies of the abstract of judgment and commitment of the San Joaquin Superior Court are appended to this brief.

^{2/} "TR" refers to the transcript on appeal in this case.

B. Proceedings in the Federal Courts

On January 7, 1966, appellant filed an application for a writ of habeas corpus in the United States District Court for the Northern District of California, Southern Division (TR 1). The Honorable Albert Wollenberg denied appellant's petition for a writ of habeas corpus by an order filed on January 13, 1966, without issuing an order to show cause (TR 28). The basis of the Court's order was that the rules announced in Escobedo v. Illinois, 378 U.S. 478 (1964) and Mapp v. Ohio, 367 U.S. 643 (1961) do not apply retrospectively. On February 16, 1966, Judge Wollenberg granted petitioner's application for a certificate of probable cause and for leave to appeal in forma pauperis.

A notice of appeal was filed by appellant on February 9, 1966 (TR 30).

In his petition to the District Court, appellant alleged the following: (1) He was not afforded effective aid of counsel either before or during trial, (2) Improper testimony of prior offenses was introduced during trial; (3) Appellant was denied his rights under the rule announced in the Escobedo case; (4) The fruit of an illegal search was used as evidence against him during trial; and (5) Appellant was subjected to an illegal arrest.

APPELLANT'S CONTENTIONS

On this appeal, appellant contends (1) the

arresting officers lacked probable cause to apprehend appellant in that the officers possessed no arrest warrant or "information which would link him with the crime" (AOB 7), and (2) appellant was subjected to an illegal search in conjunction with his arrest. Appellant thus poses whether these allegations present grounds for relief on habeas corpus.

SUMMARY OF APPELLEE'S ARGUMENT

I. The question of probable cause to arrest in this case does not raise grounds for relief on habeas corpus.

II. The Mapp rule does not apply retroactively.

ARGUMENT

I

THE QUESTION OF PROBABLE CAUSE TO ARREST IN THIS CASE DOES NOT RAISE GROUNDS FOR RELIEF ON HABEAS CORPUS.

Appellant here contends his arrest was improper as the Berkeley police had no warrant for his arrest, but rather acted at the "request" of the Oakland police (AOB 7). Appellant further alleges he was held some 48 hours without knowledge of any charge. Appellant, however, wholly fails to demonstrate how these actions of the police affected his trial and conviction.

Assuming the arrest was illegal, there are no facts before this Court which indicate any resulting

impropriety at trial.

"Being held incommunicado without being informed of the nature of the charge, may have given the applicant some rights during this period of confinement, but it does not give him any rights to be released after a jury trial, conviction and sentence. Nowhere does he allege that the court lacked jurisdiction or that any of his federal constitutional rights were invaded during or after the trial. Nor is there any claim made that anything happened at this preliminary confinement which prejudiced him at the trial."

Armstrong v. Bannan, 272 F.2d 577 at 580 (6th Cir. 1959).

In short, the defects in the arrest procedure do not offer grounds for relief on habeas corpus when the defendant has been properly charged and convicted. Curran v. Shuttleworth, 180 F.2d 781 (6th Cir. 1950); Hampson v. Smith, 153 F.2d 417 (9th Cir. 1946).

Appellant's contention therefore is without merit.

II

THE MAPP RULE DOES NOT APPLY RETROACTIVELY.

Appellant's contention as to the impropriety of the search is equally without merit. It should be noted the conviction of appellant was final on December 15, 1960,^{3/}

^{3/} Under California practice, a conviction becomes final ten days after imposition of sentence unless a notice of appeal is filed. California Rules of Court, Rule 31(a).

some time prior to the decision in Mapp v. Ohio, 367 U.S. 643 (1961). In Linkletter v. Walker, 381 U.S. 618 (1965), the Supreme Court held that the Mapp decision would not be applied retroactively to convictions which were final prior to the decision. Mapp was decided on June 19, 1961, subsequent to the finality of appellant's conviction. Consequently, appellant's allegation of an unlawful search and seizure does not state a ground for federal relief.


CONCLUSION

For the reasons stated above, it is respectfully submitted that the order of the District Court denying appellant's petition for a writ of habeas corpus should be affirmed.

DATED: October 6, 1966.

THOMAS C. LYNCH, Attorney General
of California

ROBERT R. GRANUCCI,
Deputy Attorney General

A handwritten signature in dark ink, appearing to read "Frank C. Damrell, Jr.", written in a cursive style.

FRANK C. DAMRELL, JR.,
Deputy Attorney General

Attorneys for Respondent-Appellee

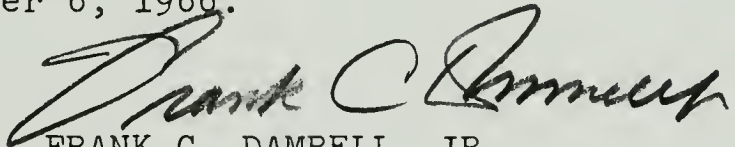
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CERTIFICATE OF COUNSEL

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19, and 39 of the United States Court of Appeals for the Ninth Circuit and that in my opinion this brief is in full compliance with these rules.

DATED: San Francisco, California

October 6, 1966.

A handwritten signature in dark ink, appearing to read "Frank C. Damrell, Jr.", written in a cursive style.

FRANK C. DAMRELL, JR.
Deputy Attorney General
of the State of California

A P P E N D I X

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(Commitment to State Prison as provided by Penal Code Section 1215.5)

Hea. N. J. LOOMIS
(Judge of Superior Court)

Alvin L. Kooris
Analyst

Notes: 1. 2. 3. 4. 5. 6. 7. 8. 9. 10. 11. 12. 13. 14. 15. 16. 17. 18. 19. 20. 21. 22. 23. 24. 25. 26. 27. 28. 29. 30. 31. 32. 33. 34. 35. 36. 37. 38. 39. 40. 41. 42. 43. 44. 45. 46. 47. 48. 49. 50. 51. 52. 53. 54. 55. 56. 57. 58. 59. 60. 61. 62. 63. 64. 65. 66. 67. 68. 69. 70. 71. 72. 73. 74. 75. 76. 77. 78. 79. 80. 81. 82. 83. 84. 85. 86. 87. 88. 89. 90. 91. 92. 93. 94. 95. 96. 97. 98. 99. 100. 101. 102. 103. 104. 105. 106. 107. 108. 109. 110. 111. 112. 113. 114. 115. 116. 117. 118. 119. 120. 121. 122. 123. 124. 125. 126. 127. 128. 129. 130. 131. 132. 133. 134. 135. 136. 137. 138. 139. 140. 141. 142. 143. 144. 145. 146. 147. 148. 149. 150. 151. 152. 153. 154. 155. 156. 157. 158. 159. 160. 161. 162. 163. 164. 165. 166. 167. 168. 169. 170. 171. 172. 173. 174. 175. 176. 177. 178. 179. 180. 181. 182. 183. 184. 185. 186. 187. 188. 189. 190. 191. 192. 193. 194. 195. 196. 197. 198. 199. 200. 201. 202. 203. 204. 205. 206. 207. 208. 209. 210. 211. 212. 213. 214. 215. 216. 217. 218. 219. 220. 221. 222. 223. 224. 225. 226. 227. 228. 229. 230. 231. 232. 233. 234. 235. 236. 237. 238. 239. 240. 241. 242. 243. 244. 245. 246. 247. 248. 249. 250. 251. 252. 253. 254. 255. 256. 257. 258. 259. 260. 261. 262. 263. 264. 265. 266. 267. 268. 269. 270. 271. 272. 273. 274. 275. 276. 277. 278. 279. 280. 281. 282. 283. 284. 285. 286. 287. 288. 289. 290. 291. 292. 293. 294. 295. 296. 297. 298. 299. 300. 301. 302. 303. 304. 305. 306. 307. 308. 309. 310. 311. 312. 313. 314. 315. 316. 317. 318. 319. 320. 321. 322. 323. 324. 325. 326. 327. 328. 329. 330. 331. 332. 333. 334. 335. 336. 337. 338. 339. 340. 341. 342. 343. 344. 345. 346. 347. 348. 349. 350. 351. 352. 353. 354. 355. 356. 357. 358. 359. 360. 361. 362. 363. 364. 365. 366. 367. 368. 369. 370. 371. 372. 373. 374. 375. 376. 377. 378. 379. 380. 381. 382. 383. 384. 385. 386. 387. 388. 389. 390. 391. 392. 393. 394. 395. 396. 397. 398. 399. 400. 401. 402. 403. 404. 405. 406. 407. 408. 409. 410. 411. 412. 413. 414. 415. 416. 417. 418. 419. 420. 421. 422. 423. 424. 425. 426. 427. 428. 429. 430. 431. 432. 433. 434. 435. 436. 437. 438. 439. 440. 441. 442. 443. 444. 445. 446. 447. 448. 449. 450. 451. 452. 453. 454. 455. 456. 457. 458. 459. 460. 461. 462. 463. 464. 465. 466. 467. 468. 469. 470. 471. 472. 473. 474. 475. 476. 477. 478. 479. 480. 481. 482. 483. 484. 485. 486. 487. 488. 489. 490. 491. 492. 493. 494. 495. 496. 497. 498. 499. 500. 501. 502. 503. 504. 505. 506. 507. 508. 509. 510. 511. 512. 513. 514. 515. 516. 517. 518. 519. 520. 521. 522. 523. 524. 525. 526. 527. 528. 529. 530. 531. 532. 533. 534. 535. 536. 537. 538. 539. 540. 541. 542. 543. 544. 545. 546. 547. 548. 549. 550. 551. 552. 553. 554. 555. 556. 557. 558. 559. 560. 561. 562. 563. 564. 565. 566. 567. 568. 569. 570. 571. 572. 573. 574. 575. 576. 577. 578. 579. 580. 581. 582. 583. 584. 585. 586. 587. 588. 589. 590. 591. 592. 593. 594. 595. 596. 597. 598. 599. 600. 601. 602. 603. 604. 605. 606. 607. 608. 609. 610. 611. 612. 613. 614. 615. 616. 617. 618. 619. 620. 621. 622. 623. 624. 625. 626. 627. 628. 629. 630. 631. 632. 633. 634. 635. 636. 637. 638. 639. 640. 641. 642. 643. 644. 645. 646. 647. 648. 649. 650. 651. 652. 653. 654. 655. 656. 657. 658. 659. 660. 661. 662. 663. 664. 665. 666. 667. 668. 669. 670. 671. 672. 673. 674. 675. 676. 677. 678. 679. 680. 681. 682. 683. 684. 685. 686. 687. 688. 689. 690. 691. 692. 693. 694. 695. 696. 697. 698. 699. 700. 701. 702. 703. 704. 705. 706. 707. 708. 709. 710. 711. 712. 713. 714. 715. 716. 717. 718. 719. 720. 721. 722. 723. 724. 725. 726. 727. 728. 729. 730. 731. 732. 733. 734. 735. 736. 737. 738. 739. 740. 741. 742. 743. 744. 745. 746. 747. 748. 749. 750. 751. 752. 753. 754. 755. 756. 757. 758. 759. 760. 761. 762. 763. 764. 765. 766. 767. 768. 769. 770. 771. 772. 773. 774. 775. 776. 777. 778. 779. 780. 781. 782. 783. 784. 785. 786. 787. 788. 789. 790. 791. 792. 793. 794. 795. 796. 797. 798. 799. 800. 801. 802. 803. 804. 805. 806. 807. 808. 809. 810. 811. 812. 813. 814. 815. 816. 817. 818. 819. 820. 821. 822. 823. 824. 825. 826. 827. 828. 829. 830. 831. 832. 833. 834. 835. 836. 837. 838. 839. 840.

Edward Ross
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in Case No. 14672 Court No. 6250 he was convicted by Jury on his plea of Guilty

'753 21347'

(guilty, not guilty, former conviction or acquittal, case in jeopardy).

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(b) *guarantee of prompt and adequate compensation for the expropriated property, including the right of the owner to receive a fair and equitable market value of the expropriated property, to be determined by competent authorities, whose decisions are subject to judicial review, or by other independent and impartial tribunals or procedures compatible with the provisions of this Article, in the country of origin or in another country if the owner so requests. Where the expropriated property is located in the territory of a State other than the expropriating State, the owner shall have the right to institute proceedings in the territory of that State, in order to obtain compensation.*

Percent 211 of the Total 2010 of the State of California

1. 计算下列各题的结果。

with prior convictions charged and proved or admitted as follows:

DATE	COUNTY AND STATE	CRIME	DISPOSITION
1/2/71	County of Alameda State of California	Arrested Robbery of the First De Pos, a felony.	Four (4) years probation; defendant to be confined in the Alameda County Jail for the first twelve (12) months of probationary period.

452

1. Interstate _____, changed and admitted being, or was found to have been armed with a deadly weapon at the time
(name of road used)

On March 1, 1968, the undersigned, who is duly licensed as a physician in California, California, was not in violation of Section 11101 of the Penal Code of the State of California. He requested that his signature be so noted on this certificate.

7. The District Attorney shall file the foregoing returns with respect to each additional count of which defendant was convicted. Additional pages if necessary.

The Court do hereby 23rd day of November, 1960 pronounce of conviction of the above-named defendant
as charged in Count No. Two

In Case No. 14091 (Count No. Two) he was convicted by Jury on his plea of
"Not Guilty"

(If guilty, not guilty, former conviction or acquittal, once in properly, not guilty by reason of
insanity, of the crime of Robbery of the First Degree, a felony

in violation of Section 211 of the Penal Code of the State of California

with prior convictions charged and proved or admitted as follows:

DATE	COUNTY AND STATE	CRIME	DISPOSITION

Defendant 185 charged and admitted being, or was found to have been armed with a deadly weapon at the time
of commission of the offense, or a convicted deadly weapon at the time of his arrest within the meaning of Penal Code Sec-
tions 26100 and 26101.

The Court do hereby 23rd day of November, 1960 pronounce of conviction of the above-named defendant
as charged in Count No. Three

In Case No. 14091 (Count No. Three) he was convicted by Jury on his plea of
"Not Guilty"

(If guilty, not guilty, former conviction or acquittal, once in properly, not guilty by reason of
insanity, of the crime of Assault with a Deadly Weapon, a felony

in violation of Section 245 of the Penal Code of the State of California

with prior convictions charged and proved or admitted as follows:

DATE	COUNTY AND STATE	CRIME	DISPOSITION

Defendant 189 charged and admitted being, or was found to have been armed with a deadly weapon at the time
of commission of the offense, or a convicted deadly weapon at the time of his arrest within the meaning of Penal Code Sec-
tions 26100 and 26101.

The Court do hereby 23rd day of November, 1960 pronounce of conviction of the above-named defendant
as charged in Count No. Four (as to Counts II and III)
to the Probation Officer for investigation, pursuant to provisions of Section
1201 of the Penal Code of the State of California, as amended, and requested
that his sentence be pronounced forthwith.

IN THE COUNTY OF SAN JUAN OF CALIFORNIA

PRESENT: Hon. H. G. WOODWARD, JUDGE

Convicted by a Jury of a Violation of Section 211 of the Penal Code of the State of California, to-wit: Robbery of the First Degree, a felony, Counts I and II; and a Violation of Section 245 of the Penal Code of the State of California, to-wit: Assault with a Deadly Weapon, a felony, Count III; and Finding Prior Conviction to be TRUE.

JAN. 20 1900 DAVID McCLELLAN, Defendant

Leonard W. Zeel, Official Court Reporter, was present and was directed to take down the proceedings in shorthand notes.

The defendant in her own waived referral to the Probation Officer for investigation, pursuant to provisions of Section 1303 of the Penal Code of the State of California, as amended, and requested that his sentence be pronounced forthwith.

[illegible]

of the Court denying said motion for a new trial; of defendant's waiver of referral to the Probation Officer for investigation pursuant to provisions of Section 1103 of the Penal Code of the State of California, as amended, and of his request that his sentence be pronounced forthwith.

The Court then asked the defendant if he had any legal cause to show why judgment should not be pronounced against him and he replied that he had none, and no sufficient cause being alleged or appearing to the Court why judgment should not be pronounced, the Court thereupon rendered its judgment: That, whereas, the said defendant JAMES DAVID McMAHON, having been duly convicted in this Court, by a jury, of the crime of a Violation of Section 211 of the Penal Code of the State of California, to-wit: Robbery, of the First Degree, a felony, Counts I and II and a Violation of Section 245 of the Penal Code of the State of California, to-wit: Assault with a deadly weapon, a felony, Count III; and finding in the conviction of said defendant, to be TRUE, and further finding defendant was armed with a deadly weapon at the time of the commission of Counts I and II;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the said defendant JAMES DAVID McMAHON be imprisoned in the State Prison of the State of California for such period of time to be hereafter fixed as provided by law.

The sentence pronounced herein as to Counts I and II to run consecutively, and sentence herein pronounced as to Count III to run concurrently with Counts I and II.

The defendant was remanded to the custody of the sheriff of the County of San Joaquin, State of California to be by him delivered into the custody of the Director of Corrections at the California Medical Facility at Folsom, State of California, forthwith.

2/17/61

